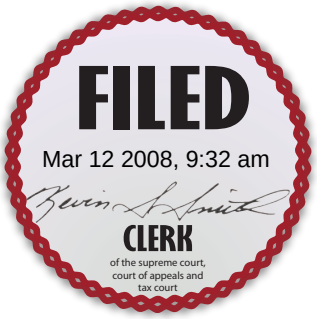


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| MICHAEL WILSON, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0707-CR-636 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0505-MR-79201
49G06-0506-MR-94361

**March 12, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

Michael Wilson appeals his murder conviction and sixty-five year sentence for that conviction and sixty-year sentence for another murder conviction.[1] We affirm.

## Issues

Wilson raises several issues on appeal, which we reorder and restate as:

I. whether there was sufficient evidence to disprove Wilson's claim of self-defense;

II. whether the trial court abused its discretion in sentencing him to enhanced consecutive sentences; and

III. whether his sixty-five year sentence is appropriate.

## Facts

The evidence most favorable to the conviction is that on May 10, 2005, Wilson went to meet Patrice Cushenberry, his pregnant girlfriend, at her apartment complex in Indianapolis. Witnesses testified that the pair was engaged in a loud argument. Cushenberry testified that as they were talking, a passerby named Demetrius Nance yelled to Wilson, "don't be swelling up on her." Tr. 359. Nance and a few other young men approached them. Kobe Blake had accompanied Wilson to the complex and stood alongside Wilson and Cushenberry. Blake testified that the men surrounded them and one of the men who was "within arm's length. . . looked like he was going to strike." Tr. p. 318. Witness Mylisha Stokes testified that Nance turned away, and Wilson pointed his

[1] Wilson is appealing sentences for two separate murder convictions that were issued the same day by the same trial court. The lower court's cause number 48G06-0505-MR-79201 relates his murder conviction for the murder of Steven Eldridge. Although the record before us contains very little information about the Eldridge murder, Wilson contends his arguments are applicable to challenges of both of the murder sentences. See Appellant's Br. p. 16 n.2.

gun at the back of Nance's head and shot. Nance died as a result of the gunshot wound. The State charged Wilson with murder and Class A misdemeanor carrying a handgun without a license.

Just weeks before Wilson shot Nance, he had fatally shot Steven Eldridge. A jury convicted Wilson of Eldridge's murder and Class A misdemeanor carrying a handgun without a license on April 11, 2006. The trial court sentenced Wilson to sixty years for murder and one year for the handgun conviction, to run concurrently. Wilson appealed and this court affirmed the convictions, but stated that Wilson was to be re-sentenced. See Wilson v. State, No. 49A04-0606-CR-319 (Ind. Ct. App. April 16, 2007). The sentencing hearing in that matter was re-set for June 21, 2007.

A jury convicted Wilson of Nance's murder and carrying a handgun without a license on June 19, 2007. According to his trial counsel, it was Wilson's "specific desire" to be sentenced on both cases on June 21, 2007. Tr. p. 486. The trial court sentenced Wilson to sixty-five years for the murder of Nance and one year to be served concurrently for the firearms charge. The trial court sentenced Wilson to sixty years for the murder of Eldridge. Those sentences were to be served consecutively for a total of 125 years executed in the Department of Correction. This appeal followed.

## Analysis

### *I. Sufficiency of the Evidence*

Wilson challenges the sufficiency of the evidence to refute his claim of self-defense. We use the same standard to review a challenge to the sufficiency of evidence to rebut a self-defense claim as we would for any sufficiency claim. Wilson v. State, 770

N.E.2d 799, 801 (Ind. 2002). We will not reweigh the evidence or judge the credibility of witnesses. Id. "If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed." Id. Once a defendant claims self-defense, the State bears the burden of disproving the claim. Pinkston v. State, 821 N.E.2d 830, 842 (Ind. Ct. App. 2004), trans. denied. "The State may satisfy its burden by either rebutting the defense directly or relying on the sufficiency of evidence in its case-in-chief." Id.

"A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force." Ind. Code § 35-41-3-2(a). An individual is justified in using deadly force only if he or she "reasonably believes that that force is necessary to prevent serious bodily injury to [the individual] or a third person." Id. In order to prevail on a self-defense claim when deadly force is used, a defendant must show that he or she: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. Wilson v. State, 770 N.E.2d 799, 800 (Ind. 2002). Once a claim of self-defense is raised and supported by evidence, the State has the burden to negate at least one of the elements. Id.

Wilson contends that because Nance and the other men were surrounding him and three men appeared to be digging in their back pockets for weapons, he acted with a reasonable fear of death or great bodily harm and in self-defense. One witness testified that when Nance turned away from the couple, Wilson pulled out a gun and shot him.

Testimony by the forensic pathologist established that Nance was shot in the back of the head. As his victim was turned away from him, Wilson could not have had a reasonable fear of great bodily injury or death. Though shots were fired after, Wilson was the first to draw and fire a gun. The evidence shows that this action was not merely reactive to an imminent threat, but rather an act of violence against an unarmed victim who had his back turned to Wilson.

Although witnesses testified that Wilson and Cushenberry were having a loud argument and Nance, the victim, interceded, Wilson contends he and Cushenberry were not arguing. He maintains that Nance approached him threateningly and he had no choice but to shoot to defend himself from Nance and the others. This contention by Wilson is merely asking that we reweigh the evidence and judge the credibility of these witnesses. We will not do that on appeal. The jury listened to the witnesses and was in the best position to assess the evidence. Its assessment that Wilson was not acting in self-defense is supported by sufficient evidence of probative value.

### *II. Abuse of Discretion*

Wilson argues that the trial court abused its discretion in sentencing him to enhanced consecutive sentences for the two unrelated murder convictions. He also contends that the trial court made a specific error in its recitation of his criminal history that amounts to an abuse of discretion and warrants a reduction to the sentence.

We engage in a four-step process when evaluating a sentence under the current "advisory" sentencing scheme. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, a trial court must issue a sentencing statement that includes "reasonably

detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

The trial court here issued a detailed oral sentencing statement. It recognized but did not give substantial weight to two mitigating circumstances—that Wilson's incarceration will be a hardship on his child and that the victim facilitated the crime or provoked the defendant. The trial court identified Wilson's criminal history as a significant aggravator, especially the fact that he had two separate murder convictions, occurring close in time. The trial court decided that the aggravators outweighed the mitigators. The trial court sentenced Wilson to sixty-five years for the murder of Nance and sixty years for the murder of Eldridge, to be served consecutively.

Wilson argues that the trial court misstated the facts involving the time between the first and second murders and such misstatement amounts to reliance on an incorrect history and an abuse of discretion. Wilson cites the trial court's following statement to support his contention: "The criminal history reflects that he committed an offense, went to a jury trial, was convicted of that offense and committed a second offense." Tr. p. 530. Although this is an incorrect recitation of the factual timeline, a reading of the sentencing transcript in its entirety reveals that the trial court recited and acknowledged the correct sequence of events. In discussing the April 28, 2005 murder of Eldridge, the trial court

stated that Wilson "was not apprehended until the second homicide . . ." and requested the parties to "correct me if I'm wrong." Tr. p. 529. In assessing the weight to give to Wilson's criminal history, the trial court explicitly stated that it relied on the dates of the offenses. The trial court also acknowledged that Wilson was in custody from the time of the conviction for the Eldridge murder until the trial in the Nance murder, so clearly the trial court knew Wilson did not commit the Nance murder after the Eldridge verdict. The trial court stressed that it considered Wilson's criminal history in terms of the "totality of the criminal history." Tr. p. 530.

The prior misstatement does not amount to an abuse of discretion because the transcript demonstrates that the trial court had a correct understanding of the sequence of Wilson's criminal history. We conclude that the trial court did not abuse its discretion when it used Wilson's criminal history and the proximity in time of the two murders as an aggravating factor for each sentence. The trial court did not abuse its discretion in ordering the sentences to be served consecutively. The two murders constituted two separate unrelated instances of criminal conduct and two separate convictions, and the aggravating circumstance of Wilson's criminal history supported the imposition of the consecutive sentences. See Mathews v. State, 849 N.E.2d 578, 589 (Ind. 2006) ("[E]ven a single aggravating circumstance may support the imposition of consecutive sentences.").

### *III. Appropriateness*

Having concluded the trial court acted within its discretion in sentencing him, we now assess whether Wilson's sentence for the murder of Nance is inappropriate under

Indiana Appellate Rule 7(B) in light of his character and the nature of the offense.[2] See Anglemyer, 868 N.E.2d at 491. Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

Wilson contends that his character and tendency to violence is merely a product of his "treacherous environment" and the "limited choices available to him." Appellant's Br. p. 16. This argument is unavailing. Wilson was free to act in any way he choose on May 10, 2005, and he choose to shoot a man at point blank range in the back of the head. Wilson's environment could not justify or explain this violent behavior and general disregard for human life.

Wilson character includes a lengthy criminal history, beginning with his first arrest when he was eight years old. He repeatedly had contacts with the criminal justice system, escalating in the level of violence. Before Nance's family members testified during sentencing, Wilson informed the court that he did not want to be present. "I don't

[2] Other than the pre-sentence investigation report, Wilson does not include information or argument specifically relating to his conviction for the murder of Eldridge. In a footnote, Wilson vaguely states that to avoid repetition and in the interest of judicial economy, "the arguments regarding the nature of the offense and character of the offender and the court's abuse of discretion apply to both causes." By failing to develop or provide cogent argument specific to the appropriateness of the sentence for the Eldridge murder, Wilson has waived this claim for appeal. See Ind. Appellate Rule 46(A)(8). We addressed the abuse of discretion arguments for both the Nance and Eldridge murder sentences because the issues there rested solely with the time and sequence of the offenses—facts that were clearly before this court.

want to hear none of this bulls[***] in here." Tr. p. 494. He showed no remorse for the death of his victim, respect for the life lost, or respect for the mourning family. We will not entertain any notion that the violence around him somehow excused his behavior and necessitates a reduction to his sentence.

Wilson contends that his crime was not in the nature of the "worst offense" and therefore did not warrant an enhancement. Appellant's Br. p. 17. He reiterates that his conduct in the commission of this offense was merely a "product of his environment." Id. Wilson fatally shot a man in the back of the head not even two weeks after shooting another man eleven times and killing him. We do not find any circumstances surrounding the commission of this crime that warrant a reduction to the sentence. We conclude the sixty-five year sentence is appropriate in light of the nature of the offense and Wilson's character.

**Conclusion**

Sufficient evidence refutes Wilson's theory of self-defense and supports Wilson's conviction for the murder of Nance. We conclude that the trial court did not abuse its discretion in sentencing Wilson, and his sixty-five year sentence is appropriate and properly ordered to run consecutive to his sixty-year sentence for the murder of Eldridge. We affirm.

Affirmed.

SHARPNACK, J., and VAIDIK, J., concur.